state within which the association is located." Plaintiff, a national bank, held stock in another national bank and was taxed as owner thereof. Taxes were also assessed against the shareholders of the plaintiff based on a valuation which included the stock ownership as an asset of the association. Plaintiff, on behalf of its shareholders, seeks to recover from the state a part of the taxes so levied upon them corresponding to assets of the value of this stock. *Held*, that such sum be refunded. Pitney, Brandeis, and Clarke, JJ., dissenting. *Bank of California, National Association* v. *Richardson*, U. S. Sup. Ct. Off., October Term, 1918, No. 262.

As instrumentalities of the federal government, national banks are exempt from state taxation, except as permitted by Congress. *M'Culloch* v. *Maryland*, 4 Wheat. (U. S.) 316; *City of Pittsburg* v. *First National Bank*, 55 Pa. St. 45. And section 5219 does not permit a state to tax such a bank upon its capital or upon its property, but only upon the shares as personal property of the holder. *Owensboro National Bank* v. *Owensboro*, 173 U. S. 664, 19 Sup. Ct. Rep. 537. An exception in this section authorizes taxation of realty. *Second National Bank* v. *Caldwell*, 13 Fed. 429; see *M'Culloch* v. *Maryland*, *supra*, 436. Also it is settled that a bank may be taxed as owner of stock in another national bank. *Bank of Redemption* v. *Boston*, 125 U. S. 60. Now the principal case holds that when the association pays such a tax, a corresponding deduction must be made in assessing its shareholders. This result can be reached only on the ground that the statute treated the bank and the shareholders as one, for purposes of state taxation. The proposition is fundamental, however, that a corporation is an entity distinct from its members, for taxation as in other respects. See 1 COOLEY, TAXATION, 3 ed., 687. Accordingly the Supreme Court has repeatedly held that a tax on a corporation or its property is not the legal equivalent of a tax on the stockholders, but that the two are distinct and different subjects-matter of taxation. See *Owensboro National Bank* v. *Owensboro*, *supra*, 677–81; T. R. Powell, "Indirect Encroachment on Federal Authority by the Taxing Powers of the States," 31 HARV. L. REV. 321, 339–44. Thus stockholders of a state bank can be taxed without deduction for its ownership of tax-exempt United States securities. *Cleveland Trust Co.* v. *Lander*, 184 U. S. 111, 22 Sup. Ct. Rep. 394. And under section 5219 stockholders of a national bank can be taxed, although its capital was wholly invested in such securities. *Van Allen* v. *The Assessors*, 3 Wall. (U. S.) 573. Moreover, where the realty of a bank has been directly taxed, the state is not required to make deduction in assessing the stockholders. *Commercial Bank* v. *Chambers*, 182 U. S. 556, 21 Sup. Ct. Rep. 863; *St. Louis National Bank* v. *Papin*, 21 Fed. Cas. No. 12,239; *People's National Bank* v. *Marye*, 107 Fed. 570, 579. It is difficult to see why the same principle should not apply to assets in the form of stock in another national bank.

BANKRUPTCY — PREFERENCES — TRANSFER PURSUANT TO PRIOR AGREEMENT LIQUIDATING THE DAMAGES. — The bankrupt had contracted to cut timber for a lumber company on the latter's lands, the funds by which the operations were to be carried on being furnished also by the lumber company. It was provided, in a clause which was construed to be an agreed ascertainment of damages, that in case of a default a nearby sawmill with its logging equipment belonging to the bankrupt should forthwith become the property of the lumber company. The agreement was entered into more than four months before bankruptcy proceedings were instituted, but the transfer of the property took place within the period. The trustee in bankruptcy sought to avoid as a preference the transfer of that part of the equipment which was composed of personalty. *Held*, that no preference was effected. *Stennick* v. *Jones*, 252 Fed. 345 (Circ. Ct. App.).

The court asserted that the company had a right to act not as a general

creditor, but under the contract. However, the mere fact that there is a contract right to a transfer will not prevent it from being a preference. *National City Bank* v. *Hotchkiss*, 231 U. S. 50. It has been held that a transfer of goods within the four-month period, according to a prior agreement, as payment for money that had been advanced to be used in their production is not a preference. *Hurley* v. *Atchison, etc. Railroad Co.*, 213 U. S. 126; *Sieg* v. *Greene*, 225 Fed. 955. *Cf. In re Klingaman*, 101 Fed. 691. But in the principal case no part of the equipment was obtained with the money advanced by the company. The decision, nevertheless, may be justified by considering the contract as one to cut timber or, upon default, to convey the property. A default having been committed, there remains the promise to convey the mill and its equipment. This promise, although it relates partly to personalty, is specifically enforceable, for it also involves land and is indivisible. *Leach* v. *Fobes*, 77 Mass. 506; *Fowler* v. *Sands*, 73 Vt. 236. There arises then an equitable ownership in the equipment which strips the transfer of its preferential character.

BILLS AND NOTES — PURCHASERS FOR VALUE WITHOUT NOTICE — BURDEN OF PROOF IN SUIT FOR CANCELLATION. — In a suit by the maker for the cancellation of a negotiable instrument shown to have been secured by fraud of the payee, the question arose as to who had the burden of proving the defendant holder a holder in due course. Section 59 of the Negotiable Instruments Law provides that "Every holder is deemed *primâ facie* to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course." *Held*, that the burden is on the defendants. *Lundean* v. *Hamilton*, 169 N. W. 208 (Ia.).

In a bill in equity for cancellation of an instrument for fraud, failure to allege that defendant is not a purchaser for value without notice is a demurrable defect. *Molony* v. *Rourke*, 100 Mass. 190. And what a party must plead he has the burden of establishing. LANGDELL, EQUITY PLEADING, 2 ed., § 185. The rules in equity should also apply to equitable defenses at law. Logically, therefore, in an action at law on a negotiable instrument by a subsequent holder, a maker setting up the defense of fraud should have the burden of establishing that plaintiff took with notice. But the rule developed that this burden be transferred to the plaintiff when fraud is shown. Its origin may have been in the principle of a discovery, the facts being peculiarly within the holder's knowledge. *Cf. Lord Portarlington* v. *Soulby*, 6 Sim. 356. In view of the pleadings the only burden shifted to the holder should be that of going forward with the evidence. Such burden, however, the courts confused with that of establishing the facts by a preponderance of evidence, owing to the dual aspect of the ambiguous term "burden of proof." See Abbott, "Two Burdens of Proof," 6 HARV. L. REV. 125; 4 WIGMORE, EVIDENCE, §§ 2483–2489. Thus the rule became established that this ultimate burden should be saddled upon the holder. *Harvey* v. *Towers*, 6 Ex. 656; *Atlas National Bank* v. *Holm*, 71 Fed. 489. The same interpretation is made under the Negotiable Instruments Law. *Parsons* v. *Utica Cement Co.*, 82 Conn. 333, 73 Atl. 785; *Leavitt* v. *Thurston*, 38 Utah 351, 113 Pac. 77. Being settled at law this construction should be followed in equity, although the result conflicts with the pleadings. *Regester's Sons Co.* v. *Reed*, 185 Mass. 226, 70 N. E. 53; *Mills* v. *Keep*, 197 Fed. 360.

CONFLICT OF LAWS — TRUSTS *INTER VIVOS* — WHAT LAW GOVERNS. — Two settlors, of New York and New Jersey respectively, contributed an equal amount to a fund of which they declared themselves trustees by instrument